

STATE OF NEW YORK
DIVISION OF TAX APPEALS

In the Matter of the Petitions	:	
of	:	
EUGENE BURBACKI,	:	
OFFICER OF RIA RESTAURANT, INC.	:	
for Revision of Determinations or for Refund	:	
of Sales and Use Taxes under Articles 28 and 29	:	
of the Tax Law for the Period March 1, 1988	:	
through February 28, 1991.	:	DETERMINATION
	:	DTA NOS. 810862,
	:	810863 AND
	:	810864

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RIA RESTAURANT, INC.	:
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of the Tax Law for the Period March 1, 1988	:
through February 28, 1991.	:

Petitioners, Eugene Burbacki, officer of RIA Restaurant, Inc., and RIA Restaurant, Inc., 2770 West 5th Street, Apt. 12A, Brooklyn, New York 11224-4223, filed petitions for revision of determinations or for refund of sales and use taxes under Articles 28 and 29 of the Tax Law for the period March 1, 1988 through February 28, 1991.

A consolidated hearing was held before Brian L. Friedman, Administrative Law Judge, at the offices of the Division of Tax Appeals, 500 Federal Street, Troy, New York, on July 21, 1993 at 9:15 A.M., with all briefs to be submitted by November 29, 1993. Petitioners appeared by Eleanora M. DiLorenzo, Esq. The Division of Taxation appeared by William F. Collins, Esq. (Andrew S. Haber, Esq., of counsel).

ISSUES

I. Whether the Division of Taxation properly made a request for the books and records of RIA Restaurant, Inc. for the period at issue.

II. Whether the Division of Taxation properly resorted to external indices to determine additional sales and use taxes due from RIA Restaurant, Inc.

III. Whether, if the resort to external indices was proper, such methodology was reasonably calculated to reflect sales and use taxes due.

IV. Whether petitioners have shown that their failure to pay the proper amount of tax within the time required was due to reasonable cause, thereby warranting abatement of penalties assessed.

FINDINGS OF FACT

Pursuant to an audit of petitioner RIA Restaurant, Inc. ("RIA"), which commenced in February 1991, the Division of Taxation ("Division"), on June 10, 1991, issued the following notices of determination and demands for payment of sales and use taxes due to RIA:

<u>Period</u>	<u>Tax</u>	<u>Penalty</u>	<u>Interest</u>	<u>Total</u>
3/1/88-2/28/91	\$79,206.00	\$18,467.97	\$14,785.41	\$112,459.38
3/1/88-2/28/91	--	7,920.60	--	7,920.60

On the same date, the Division also issued notices of determination to petitioner Eugene Burbacki, as officer of RIA, in identical amounts for the same periods.

On June 14, 1991, the Division issued three notices of determination and demands for payment of sales and use taxes due to Eugene Burbacki as follows:

<u>Period Ended</u>	<u>Tax</u>	<u>Penalty</u>	<u>Interest</u>	<u>Total</u>
2/28/90	\$3,079.04	\$738.96	\$492.03	\$4,310.03
5/31/90	2,550.08	535.50	319.39	3,404.97
8/31/90	2,515.84	452.83	230.78	3,199.45

These notices of determination were issued as a result of checks (see, Exhibits "N", "O" and "P") issued by RIA and signed by Eugene Burbacki which were for the payment of sales tax for the above quarters. Each of the checks was returned for insufficient funds.

RIA operated a delicatessen/restaurant known as Rudy's which was located at 387-389

South Oyster Bay Road in Plainview, New York. The restaurant began operation in about 1954; the sole owner of the corporate stock and the operator of the restaurant, from its inception until approximately November 1984, was Rudolf Lefkovits.

By written agreement dated November 15, 1984, Rudolf Lefkovits agreed to sell all of the corporate stock of RIA to Eugene Burbacki (see, Exhibit "4"). For purposes of this proceeding, the relevant terms of this agreement were as follows:

(a) There were to be two closings: the first closing to be held within four business days of receiving State Liquor Authority approval of the corporate change of ownership (permitting Eugene Burbacki to become a 50% stockholder) and the second closing to be held approximately 24 months after the first. The total purchase price (to be paid at various stages) was \$600,000.00 (\$275,000.00 for the "First Purchase" and \$325,000.00 for the "Second Purchase");

(b) For the first 24 months following the first closing, both the purchaser (Burbacki) and the seller (Lefkovits) were to be employed at the restaurant. During this period, all corporate checks, notes or other drafts were to bear the signature of both. The seller was to have sole managerial responsibility, including the hiring and firing of personnel, purchasing and setting prices. The seller was to be liable for any tax assessments for any period prior to the date of the first closing with proportionate liability for periods thereafter; and

(c) Upon the first closing, the purchaser was to become a 50% shareholder (100% after the second closing). Immediately after the first closing, the purchaser, along with the seller, were to be elected as directors and the directors were to elect the seller as president and the purchaser as secretary of the corporation.

The Division previously conducted an audit of this business for the period March 1, 1983 through February 28, 1986. Based upon the auditor's determination that books and records were incomplete and, therefore, inadequate for the performance of a detailed audit, an observation of the business premises had been conducted for three days (April 29, 1986,

June 24, 1986 and October 27, 1986) between the hours of 8:00 A.M. and 10:00 P.M. Certain adjustments to the results were made (for a smorgasbord held on one day and \$100.00 daily adjustment for increased sales due to local advertisements). The day with the highest taxable sales was eliminated from the observation test. An average of the remaining two days was calculated. As a result, additional taxable sales of \$292,969.00 were determined, with tax due thereon in the amount of \$23,969.50. Penalty and interest were also imposed in the assessment issued on February 3, 1987.

An administrative hearing relative to this assessment was held on July 25, 1989 and the Division of Tax Appeals sustained the assessment in its entirety. Eugene Burbacki testified that he did not agree with the assessment, but that Rudolf Lefkovits paid it.

The present audit was initiated by an appointment letter, dated March 20, 1991, which was presented to Eugene Burbacki on that date by the auditor who visited the premises in order to ascertain hours of operation and to obtain a menu indicating what was sold. The auditor initially met with a counterman who identified Eugene Burbacki as the owner. Mr. Burbacki later appeared and showed the auditor how the cash register computed tax. He stated that he zeroed out the register each day. Attached to the letter was a checklist of records to be presented for audit. The appointment letter stated that the audit period was 3/1/88-2/28/91 and set up an appointment to examine books and records on April 8, 1991. The auditor thereafter received a telephone call from Joseph Chanin who stated that he was RIA's representative and who requested that the appointment be changed to March 27, 1991. A consent to extend the statute of limitations for assessment was left for Mr. Burbacki at the initial visit on March 20, 1991 and a revised consent was left with a Mr. Chanin on March 27, 1991. Neither was ever signed by Mr. Burbacki. The auditor testified that she was aware that the assessment had to be issued soon so as not to have the first quarter at issue barred by expiration of the statute of limitations.

On March 27, 1991, the auditor again went to the restaurant and met Mr. Chanin there. The auditor stated that she did not receive all the records requested. Provided to the auditor

were sales tax returns, Federal income tax returns, depreciation schedules, a cash receipts journal, a partial check disbursements journal and payroll records. Register tapes, guest checks, catering contracts, bank statements, complete check disbursement record, purchase records (by check and cash) and utility bills were not provided. The auditor thereupon left a handwritten list of additional records needed and scheduled another appointment for April 5, 1991 (see, Exhibit "V"). Mr. Chanin then telephoned to request a postponement of the appointment because he was busy due to tax season. On April 11, 1991, the auditor telephoned the restaurant but received no answer. On the same date, she again visited the premises and discovered that the restaurant was closed.

On April 16, 1991, Joseph Chanin telephoned the auditor to advise that the business had been abandoned and that he was withdrawing from the case. By letter dated April 22, 1991 and received April 24, 1991 (Exhibit "Z"), Mr. Chanin's power of attorney was formally withdrawn.

On April 18, 1991, the auditor sent a certified letter to Eugene Burbacki requesting that the following records be provided, at her office, on May 6, 1991. The letter stated, in part, as follows:

"Please submit the following records at our office, at 9:00 AM, on May 6, 1991. (All were previously requested on 3/20/91 and 3/27/91. Copies enclosed for your convenience).

- 1) General Ledger or accountants work sheets for the period 3/1/88 - 2/28/91
- 2) Day Books 3/1/88 - 2/28/91
- 3) Bank Statements 3/1/88 - 2/28/91
- 4) ST 100's with accompanying worksheets 3/1/88 - 2/28/91
- 5) Payroll Records 1988,89,90
- 6) Register tapes, and guest checks, as available
- 7) Completed Officer Questionnaire
- 8) Purchase Invoices 3/1/88 - 2/28/91
- 9) Expense Purchases for 1990
- 10) Fixed Asset/Equipment purchases 3/1/88 - 2/28/91
- 11) Personal Income Tax Returns for Corporate officers 1989 & 1990
- 12) Documentation supporting non-taxable sales"

This letter was sent to 785 Ocean Parkway, Brooklyn, New York 11230, which was the address previously furnished by Mr. Burbacki. It should also be noted that the letter of withdrawal by Joseph Chanin (Exhibit "Z") also indicated that all further correspondence should be sent to

Mr. Burbacki at that address. This letter was returned as undeliverable. A new address (2770 West 5th Street, Apt. 12A, Brooklyn, New York 11224-4223) was obtained from the Tax Compliance Bureau of the Division and another letter, dated April 29, 1992, was sent, by certified mail, to Mr. Burbacki at the newly obtained address. This letter included copies of all previous letters of correspondence and also advised Mr. Burbacki of Joseph Chanin's withdrawal from the case.

On May 7, 1991, the auditor again visited the restaurant which, at that time, was undergoing renovation. She obtained the name of the landlord (Treeco Management) from whom she subsequently learned that RIA had been paying more rent than claimed on its Federal income tax returns. She was also informed that the premises had been abandoned due to nonpayment of rent.

At her initial meeting with Eugene Burbacki on March 20, 1991, the auditor was informed that the restaurant was dealing primarily in cash because his suppliers would not extend credit to him. No purchase invoices or list of cash payments was provided, however. At that same meeting, the auditor advised Mr. Burbacki to begin saving register tapes and guest checks. None was furnished to the auditor.

The auditor also testified that, upon her review of the sales tax returns and the Federal income tax returns of RIA, she initially found a discrepancy of approximately \$250,000.00. A subsequent examination of the returns, however, revealed that the actual discrepancy was \$34,510.00 (see, Schedule E of Exhibit "T").

As a result of the auditor's determination that RIA's books and records were inadequate for the performance of a detailed audit and because the restaurant had been closed and abandoned, she decided to determine additional tax due through the use of the prior audit results with adjustments due to rising prices. From the prior audit file, she obtained a menu from March 1986 and compared the prices on that menu with those listed on the menu she had received on her visit to the restaurant on March 20, 1991. A review of the prices revealed that, in the five-year period, prices had risen approximately 19.8%. The audit file from the prior

audit stated that prices were increased 4.6% in August of each year.

As was done in the prior audit, the taxable sales from the day on which sales were the highest (June 24, 1986 - \$1,710.67) were excluded from the calculation. In the prior audit, \$100.00 had been deducted from one of the days utilized in the computation due to an advertising campaign in a local paper. No such deduction was allowed in the present matter because there was no evidence of another such advertising campaign. Taxable sales from the remaining days were averaged ($\$1,653.86$ for 5/29/86 + $\$897.43$ for 10/27/86 = $\$2,551.29$, divided by 2 = $\$1,275.65$). The result was then multiplied by 90 (days per quarter) to determine 1986 quarterly taxable sales of $\$114,808.50$. Five days per year were allowed for holiday closings (six days were allowed for the 1988 leap year).

To determine quarterly taxable sales for the period September 1, 1987 through August 31, 1988, the 1986 quarterly taxable sales figure of $\$114,808.50$ was multiplied by the percentage of annual price increase (.0464) to arrive at quarterly taxable sales of $\$120,135.61$. By using the same method of calculation, quarterly taxable sales for the periods September 1, 1988 through August 31, 1989, September 1, 1989 through August 31, 1990 and September 1, 1990 through February 28, 1991 were determined to be $\$125,709.91$, $\$131,542.85$ and $\$137,646.43$, respectively.

Estimated taxable sales for the audit period were, therefore, found to be $\$1,544,575.12$. Nontaxable sales claimed on RIA's sales tax returns ($\$338,293.00$) were allowed in full. For the period, RIA had reported taxable sales of $\$557,675.00$ which, when subtracted from estimated taxable sales, resulted in additional taxable sales of $\$986,900.12$, with tax due thereon (at 8%) of $\$78,958.00$.

No tax was assessed on expense purchases since such purchases were considered by the auditor to be minimal. Tax of $\$248.00$ was assessed on an equipment purchase in 1989 in the amount of $\$3,100.00$. Total tax due was, therefore, determined to be $\$79,206.00$.

Petitioner Eugene Burbacki testified that he entered the restaurant business in 1984 with no prior experience in the business. After the second closing (see, Finding of Fact "2"), Rudolf

Lefkovits retired (June 1987). Mr. Burbacki testified that soon after Rudolf Lefkovits' retirement, business began to decline almost immediately. The reasons for this decline were as follows:

(a) Plainview Centre, the shopping mall wherein the restaurant was located, underwent extensive construction between April 1988 and June 1989. During the renovation, sidewalks and roads were torn up and the fronts of the various businesses were obscured by scaffolding;

(b) Food Parade, Inc. d/b/a Foodtown began doing business in Plainview Centre on July 11, 1990. Upon opening at this new location, Foodtown operated a delicatessen department. The provisions of RIA's lease in Plainview Centre (see, Exhibit "7") which ran from January 1, 1973 through December 31, 1990 provided, in paragraph 58 thereof, as follows:

"Provided tenant is not in default, Landlord agrees not to lease or rent space to any premises in the future at the Plainview Shopping Center for use as a delicatessen store or containing a delicatessen counter, which operation shall be defined as the sale of prepared and cooked meats, together with the incidentals normally sold at delicatessen counters."

Mr. Burbacki testified that a representative of the landlord presented him with a lease amendment (see, Exhibit "6") in 1986 (the amendment was executed October 17, 1986) which provided as follows:

"1) TREECO/Plainview Limited Partnership as landlord and tenant indicated below has [sic] entered into a lease for premises at the Plainview Shopping Center.

"2) Landlord proposes to add to the center a major, full-service supermarket in excess of 35,000 square feet generally on the site formally occupied by RKO Theatre.

"3) Landlord agrees in connection with such supermarket lease to renovate the entire shopping center.

"4) In consideration for such agreement, and the additional business at the center the supermarket is expected to generate, tenant agrees that any exclusive [sic] in tenant's lease shall not apply to goods and services customarily offered by a full-service supermarket."

Mr. Burbacki stated that he agreed to this amendment because his lease was to expire

in 1990 and, when another tenant had refused to accede to a request of the landlord, its lease was not renewed upon expiration;

(c) Prior to the retirement of Rudolf Lefkovits, on or about April 12, 1987, there was a fire in the restaurant which resulted in the closing of the business for approximately five weeks. Because the restaurant was closed for such an extensive period, business was lost and many of the customers did not return;

(d) Prior to and during the audit period, a declining economy with resulting unemployment extensively affected RIA's business; and

(e) As evidenced by the fact that many of RIA's debts had to be paid from non-corporate funds, most notably the private checking account of Eugene Burbacki's wife, Ella Burbacki (see, Exhibit "8"), petitioner had severe financial problems which ultimately resulted in default in payment of rent in the amount of \$15,178.20. As a result of nonpayment, RIA was directed to surrender the premises by April 4, 1991 (see, Exhibit "10").

Petitioner Eugene Burbacki stated that RIA's representative during the prior audit, Joseph Chanin, had told Rudolf Lefkovits that it was not necessary to keep all register tapes and guest checks because doing so would soon fill the restaurant. Mr. Chanin told Mr. Lefkovits to "keep a week here, a week there, you know, not everyday."

As a result of this advice, Eugene Burbacki testified that he had kept about one year's worth of register tapes and guest checks during the audit period. He also stated that, along with these register tapes and guest checks, he had bank statements, bills, invoices and checkbooks which were kept downstairs in the business premises.

After Joseph Chanin resigned as the corporation's representative, Mr. Burbacki made an appointment to see a new representative, Ira Friedman, who had an office in Manhattan. In preparation for this appointment, he put all of RIA's records in the trunk of the car. However, on August 13, 1991, Mr. Burbacki's vehicle, a 1988 Oldsmobile Cutlass, was stolen in Brooklyn. The vehicle was never recovered. On page 3 of Eugene Burbacki's affidavit of

vehicle theft (see, Exhibit "13") submitted to the Allstate Insurance Company, it was stated that among the personal property in the vehicle at the time of its theft were papers and bills pertaining to RIA relative to a sales tax audit. It should be noted that this affidavit was neither signed nor sworn to by Eugene Burbacki.

Approximately eight or nine months prior to abandoning the restaurant, Eugene Burbacki obtained a license to practice dentistry in New York State. Since he had already spent approximately \$300,000.00 to \$350,000.00 and could not borrow anymore, he decided to abandon the restaurant business and begin the practice of dentistry. He tried to sell the business but could find no buyers. The restaurant equipment belonged to Mr. Lefkovits who received \$10,000.00 therefrom (see, Exhibit "11").

SUMMARY OF PETITIONERS' POSITION

Petitioners contend as follows:

(a) Resort to the use of external indices was improper because:

(1) Numerous records including register tapes and guest checks were maintained and kept in the basement. Attached to petitioners' brief was a letter from Richard S. Kaplan, CPA, to petitioners' representative, dated September 20, 1993, which sets forth an analysis of bank deposits with Federal income tax returns and sales tax returns. This analysis concludes total gross sales reported for the audit period were accurate despite the fact that bank deposits for each year were less than sales reported on the sales tax returns. Also attached to the brief are voluminous bank statements of RIA from The Bank of New York. It should be noted that the testimony of the auditor (see, Finding of Fact "4") and the checklist of records contained in the audit report (Exhibit "T") do not indicate that bank statements were provided to the auditor prior to the issuance of the assessment;

(2) Petitioners maintain that these records were made available to the auditor, but that the auditor declined to examine them until all of the requested records were provided (some records were in the possession of the accountant);

- (3) Requests for records were either sent to the wrong person, to the wrong address or there is no proof that they were sent or received. The Division has not presented adequate proof that petitioners received the certified mailings;
 - (4) The lack of an executed consent caused the auditor to issue an estimated assessment in order to avoid losing a quarter due to the expiration of the statute of limitations; and
 - (5) The subsequent loss of the records after the assessment was issued does not now justify the improper resort to external indices.
- (b) Petitioners have established, by clear and convincing evidence, that the audit method was not reasonably calculated to reflect tax due and that the result therefrom was improper. Reliance on an observation test from a prior audit period was improper because there were several material changes in the business in the intervening period (see, Finding of Fact "7"); and
- (c) Penalty should be abated because petitioner Eugene Burbacki, in a good faith attempt to make timely payment of sales tax, issued checks in the final quarters of operation when the business was unable to meet its operating expenses. This is evidence of reasonable cause and not willful neglect even though the checks were dishonored for insufficient funds.

CONCLUSIONS OF LAW

A. Tax Law § 1138(a)(1) provides, in part, that if a return required to be filed is incorrect or insufficient, the amount of tax due shall be determined on the basis of such information as may be available. This section further provides that, if necessary, the tax may be estimated on the basis of external indices. The resort to external indices is predicated upon a finding of insufficiency in the taxpayer's recordkeeping such that verification of sales is a virtual impossibility (Matter of Chartair, Inc. v. State Tax Commn., 65 AD2d 44, 411 NYS2d 41). In such circumstances, the Division must select a method of audit reasonably calculated to reflect tax due (Matter of Grecian Square v. State Tax Commn., 119 AD2d 948, 501 NYS2d 219), and

the burden is on petitioner to establish by clear and convincing evidence that both the method used to arrive at the tax assessment and the assessment itself are erroneous (Matter of Sol Wahba, Inc. v. State Tax Commn., 127 AD2d 943, 512 NYS2d 542).

To determine the adequacy of a taxpayer's records, the Division must first request and thoroughly examine the taxpayer's books and records for the entire period of the proposed assessment (Matter of Adamides v. Chu, 134 AD2d 776, 521 NYS2d 826, lv denied 71 NY2d 806, 530 NYS2d 109; Matter of King Crab Restaurant v. State Tax Commn., 134 AD2d 51, 522 NYS2d 978). The purpose of this examination is to determine whether the records are so insufficient as to make it virtually impossible for the Division to verify taxable sales receipts and conduct a complete audit (Matter of Chartair, Inc. v. State Tax Commn., supra; Matter of Ronnie's Suburban Inn, Tax Appeals Tribunal, May 11, 1989).

In Matter of Todaro (Tax Appeals Tribunal, July 25, 1991) the Tribunal set forth the applicable principles to determine the adequacy of a request for records as follows:

"To determine the adequacy of a taxpayer's records the Division must first request (Matter of Christ Cella, Inc. v. State Tax Commn., supra, 477 NYS2d 858, 859) and thoroughly examine (Matter of King Crab Rest. v. Chu, 134 AD2d 51, 522 NYS2d 978, 979-980) the taxpayer's books and records for the entire period of the proposed assessment (Matter of Adamides v. Chu, 134 AD2d 776, 521 NYS2d 826, 828, lv denied 71 NY2d 806, 530 NYS2d 109). The request for records must be explicit and not 'weak and casual' (Matter of Christ Cella, Inc. v. State Tax Commn., supra).

"The purpose of the examination is to determine, through verification drawn independently from within these records (Matter of Giordano v. State Tax Commn., 145 AD2d 726, 535 NYS2d 255, 256-57; Matter of Urban Ligs. v. State Tax Commn., 90 AD2d 576, 456 NYS2d 138, 139; Matter of Meyer v. State Tax Commn., 61 AD2d 223, 402 NYS2d 74, 76, lv denied 44 NY2d 645, 406 NYS2d 1025; see also, Matter of Hennekens v. State Tax Commn., 114 AD2d 599, 494 NYS2d 208, 209), that they are, in fact, so insufficient that it is 'virtually impossible (for the Division of Taxation) to verify taxable sales receipts and conduct a complete audit' (Matter of Chartair, Inc. v. State Tax Commn., supra, 411 NYS2d 41, 43), 'from which the exact amount of tax can be determined' (Matter of Mohawk Airlines v. Tully, 75 AD2d 249, 429 NYS2d 759, 760).

"Where the Division follows this procedure, thereby demonstrating that the records are incomplete or inaccurate, the Division may resort to external indices to estimate tax (Matter of Urban Ligs. v. State Tax Commn., supra)."

In the present matter, it is clear that an adequate request for RIA's books and records was made. In fact, such request was made on more than one occasion (see, Finding of Fact "4").

The fact that some correspondence was sent by certified mail and was not received due to an incorrect address does not change this conclusion since the record indicates that both Eugene Burbacki and petitioners' then-representative, Joseph Chanin, were personally presented with requests for records. The Division had no duty to mail appointment letters and requests for records by certified mail and, therefore, was not required to prove receipt. Due to the fact that one such piece of correspondence (the letter of April 18, 1991) was returned as undeliverable, the auditor attempted to ascertain Mr. Burbacki's new address and remailed the request on April 29, 1991. It must be concluded, therefore, that the Division exercised due diligence in seeing to it that Mr. Burbacki and his representative were clearly and adequately informed as to the books and records needed to perform the audit.

B. Having, therefore, found that the Division made an adequate request for the books and records of RIA, it must next be determined whether the resort to external indices was proper. Petitioner Eugene Burbacki admittedly (see, Finding of Fact "8") did not maintain cash register tapes and guest checks for the entire audit period. Clearly, this violates the provisions of Tax Law § 1135(a)(1) which provides that "[e]very person required to collect tax shall keep records of every sale" 20 NYCRR 533.2(b)(1) provides, in pertinent part, as follows:

"Every person required to collect tax, including every person purchasing or selling tangible personal property for resale must keep records of every sale, amusement charge, charge for dues or occupancy, and all amounts paid, charged or due thereon, and of the tax payable thereon. The records must contain a true copy of each:

"(i) sales slip, invoice, receipt, contract, statement or other memorandum of sale;

"(ii) guest check, hotel guest check, receipt from admissions such as ticket stubs, receipt from dues; and

"(iii) cash register tape and any other original sales document."

While petitioner Eugene Burbacki contends that he had, prior to the theft of his automobile with RIA's books and records in the trunk, many register tapes and guest checks, such contention is not supported by the record herein. Even assuming, arguendo, that these register tapes and guest checks were kept and were made available to the auditor, they were,

admittedly, not complete. The bank statements submitted along with petitioners' brief are not sufficient in the absence of original source documents to confirm that all receipts were actually deposited (see, Matter of Vebol Edibles v. State of New York Tax Appeals Tribunal, 162 AD2d 765, 557 NYS2d 678, lv denied 77 NY2d 803, 567 NYS2d 643; Matter of Club Marakesh v. Tax Commn. of State of N.Y., 151 AD2d 908, 542 NYS2d 881, lv denied 74 NY2d 616, 550 NYS2d 276). Journals or summaries without the original source documents do not comply with the aforesaid provisions of the Tax Law and regulations (see, Matter of Bonanno v. State Tax Commn., 145 AD2d 693, 534 NYS2d 829). Absent the required source documents, i.e., cash register tapes and guest checks, the Division's resort to external indices to determine taxable sales was, therefore, proper.

Although the auditor testified that she was concerned that the statute of limitations on the first quarter at issue (March 1 - May 31, 1988) would expire absent a validly executed consent from petitioner, the assessment at issue herein was based upon information (the observation test conducted in the prior audit along with the current menu prices). This is clearly distinguishable from the facts in Brown v. New York State Tax Commn. (199 Misc 349, 99 NYS2d 73, affd 279 App Div 837, 109 NYS2d 626, affd 304 NY 651), wherein the court determined that the State Tax Commission exceeded its statutory authority in issuing the assessment which was not based upon any information and was totally fictitious. The court found that the assessment was apparently served to procure an extension of time for the Commission to make a valid determination of additional tax due. That is not true in the present matter.

C. Petitioners contend that the use of the observation test from the prior audit period was not an audit method reasonably calculated to reflect tax due because of material changes in the business from the time of the prior audit to the time of the present one (see, Finding of Fact "7"). That these circumstances (most notably, the retirement of Rudolf Lefkovits, the renovation of Plainview Centre and the competition of Foodtown's deli department) existed are not in dispute; however, while it is possible that because of these circumstances petitioners may be entitled to some allowances, petitioners have the burden of proving not only the entitlement

thereto but also the correct amount of such allowances (Matter of Ristorante Puglia v. Chu, 102 AD2d 348, 478 NYS2d 91, 93; Matter of Oggi Restaurant, Tax Appeals Tribunal, November 30, 1990). From the evidence presented, it is not possible to properly determine how much of an allowance, if any, should be granted for each of the circumstances advanced by petitioners.

It is well established that where the taxpayer's own failure to maintain the proper records prevents exactness in the determination of sales tax liability, exactness is not required (Matter of Meyer v. State Tax Commn., 61 AD2d 223, 402 NYS2d 74, lv denied 44 NY2d 645, 406 NYS2d 1025; see also, Matter of SHB Supermarkets v. Chu, 135 AD2d 1048, 522 NYS2d 985).

"Considerable latitude is given an auditor's method of estimating sales under such circumstances as exist in [each] case" (Matter of Grecian Square v. State Tax Commn., 119 AD2d 948, 501 NYS2d 219, 221). In the present matter, the auditor was faced with a particularly difficult set of circumstances, i.e., source documentation (cash register tapes and guest checks) were not made available and the restaurant ceased operation before the audit could be commenced. This eliminated the possibility of performing an updated observation test. The auditor was faced with few alternatives. Utilization of the prior audit's observation test, with adjustments for price increases, must, therefore, be found to have been reasonable under this particular set of facts. While, as previously pointed out, petitioners may have been entitled to some adjustments for a variety of changed circumstances, they have failed to sustain their burden of proving the proper amount of adjustment for each. Bare allegations of entitlement thereto are insufficient. The audit method utilized by the auditor and the resulting assessment must, therefore, be sustained.

D. Finally, petitioners contend that the fact that checks in payment of RIA's sales tax liability were issued, even though such checks were dishonored for insufficient funds, is proof that a good faith effort was made to timely pay the taxes and, as such, penalties should be abated. This contention is entirely without merit.

20 NYCRR 536.5 provides several grounds upon which a finding of reasonable cause can be made. Financial distress or the need to use the taxes collected for other obligations is not included therein. It must also be noted that the Appellate Division, Third Department, has specifically rejected financial distress as a basis for establishing reasonable cause (Matter of F & W Oldsmobile v. Tax Commn., 106 AD2d 792, 484 NYS2d 188). To permit a taxpayer to circumvent the requirements of the Tax Law in times of financial hardship merely by issuing checks with the knowledge that there were insufficient funds in the account to pay the checks would be a total miscarriage of justice and would completely negate the legislative intent in imposing penalties for failure to timely pay one's sales tax liability. Penalties assessed herein must, therefore, be sustained.

E. The petitions of Eugene Burbacki, officer of RIA Restaurant, Inc., and RIA Restaurant, Inc. are denied and the notices of determination and demands for payment of sales and use taxes due issued to these petitioners on June 10, 1991 and June 14, 1991 are hereby sustained in their entirety.

DATED: Troy, New York
May 19, 1994

/s/ Brian L. Friedman
ADMINISTRATIVE LAW JUDGE